SUPREME COURT OF THE UNITED STATES.

No. 124.

THE ÆTNA INSURANCE COMPANY AND JOSEPH B. BENNETT,

vs.

DOE., EX. DEM., ALLEN C. HALLOCK AND WILLIAM H. P. STODDARD.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Hughes Dewey & Peck
Counsel

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BRIEF ON BEHALF OF DEFENDANT IN ERROR.

EJECTMENT BY DEFENDANT IN ERROR

vs.

PLAINTIFF IN ERROR.

Trial by the Court, (by agreement of parties under a late act of Congress,) and finding for the plaintiff.

For submission and finding, see page 3 of printed Record.

Motion for a new trial by defendants overruled, and judgment on the finding, page 4 of printed Record.

The defendants' bill of exceptions on page 4 of the printed Record shows that the plaintiff had title prior to and at the time of the sheriff's sale, under which the defendants claimed title. (See bill of exceptions, page 4, printed Record.)

The defendants then, for the purpose of proving their title, introduced a certified transcript of a Record of the Court of Common Pleas of Vanderburgh county, in an action brought by the Ætna Insurance Company *vs.* Allen C. Hallock and his wife, and William H. P. Stoddard, including a decree of foreclosure, ordering the sale of the premises in controversy. Copy of decree of sale issued to the Sheriff, and his return thereon. (See printed Record, from 4th to 12th page.)

The only exceptions taken or points reserved will be found in the bill of exceptions on page 12 of the printed Record, and are as follows, viz:

First. An exception to the finding of the court on the issue of fact found on the plea of not guilty.

Second. An exception to the judgment of the Court in overruling the defendant's motion for a new trial. The defendant in error insists that there is no question reserved upon which the proceedings of the Circuit Court can be reversed on a writ of error in this court.

The defendant in error makes the following points, viz:

First. The writ of error should be dismissed or quashed because the Record shows there was no question of law reserved below upon which a writ of error can be predicated.

The exception to the opinion of the court, finding the defendants guilty of the trespasses and ejectments complained of, was a judgment or finding upon a pure question of fact, and cannot therefore be assigned for error in this Court. True, the reason of the finding is given, and if even that reason was unreserved (a thing which we by no means admit,) still a very bad reason may be given for a very good judgment.

If the defendants wished to reserve the question as to the efficiency of the execution in the absence of the seal of the proper court thereto, they should have objected to the plaintiffs introducing the original execution for the purpose of showing that the seal was wanting.

The defendant, by the transcript introduced by him, having shown an execution, if that execution was good without a seal, of course proof that it had no seal was wholly immaterial, and such proof should have been objected to, and if the objection was overruled the exception should have been reserved to this ruling.

Again, the overruling of the defendant's motion for a new trial cannot be made the basis of an assignment of errors, or of a writ of error in this Court, as has been repeatedly decided by this Court.

But, if the overruling of a motion for a new trial could be made the basis of a writ of error, the bill of exceptions should contain all the evidence given on the trial in the Court below, so that this Court might be able to decide whether the new trial should have been granted or not. In this case the bill of exceptions does not purport to set forth, and does not set forth all the evidence upon which the Circuit Court acted. It does not even show that any deed from the sheriff to Bennett in pursuance of the sale, was read or offered in evidence.

But defective as the bill of exceptions is, in not showing all the evidence, it shows enough to show that the sale could not have been valid if even the execution had been sealed.

By the 345th section, on page 242, of 2nd Gavin & Hord, it is provided, that no property shall be sold on any execution or order of sale issued out of any court for less than two-thirds of the appraised cash value thereof, exclusive of liens, &c.

In this case the transcript offered in evidence by the defendants, as the basis of their title, showed that the eight lots in controversy had been appraised in six separate parcels, as follows, viz:

Lots 1 and 2 as one parcel, at - - - -	$350
Lot 3, at - - - - - - - - - -	175
Lot 4, at - - - - - - - - - -	175
Lot 5, at - - - - - - - - - -	175
Lot 6, at - - - - - - - - - -	175
Lots 7 and 8 jointly as one parcel, at - . -	300
	$1,350

This is shown on page 10 of the printed Record.

Now we have on page 11 the sheriff's return, showing not the sale of each of the appraised parcels at two-thirds of its appraised value, but the sale of all the parcels for $910, that being ten dollars more than the two-thirds of the sum of all the appraisements of the several parcels. We hold, and the Court below so decided, that the sale must follow or conform to the appraisement; and and where there is a separate appraisement there must be a separate sale; and it must be shown that each parcel brought at least two-thirds of the appraised value.

Suppose the sales had been in separate parcels, according to the appraisement, and some of the parcels had been struck off at more than two-thirds of the appraised value, and others at less, could it be pretended that the excess in the one class of sales could be applied to make up the deficit in the other, and thus legalize both, if the aggregate of the sums bid was equal to two-thirds of the aggregate of the appraised values.

If this could not be done the same thing cannot be accomplished by selling the six parcels jointly as one parcel for a sum equal to the aggregate amount of two-thirds of the separate appraised values; but each parcel must be sold for at least two-thirds of the amount of its own appraised value.

It is proper to observe that the point here made is distinct from the question as to the duty of the sheriff in all cases, whether there is an appraisement or not, to sell property levied upon in separate parcels whenever it is in its nature susceptible of subdivision.

By the 466th section, on page 249 of 2d Gavin & Hord, it is enacted, that where real estate levied on "shall consist of several lots, tracts, and parcels, each shall be offered separately, &c."

There is a late decision in 23rd Indiana Reports, in which it is held that, if the real estate consists of several distinct lots or parcels, and there is *an offer to sell* in parcels and no bid, the sheriff may then sell the several parcels together as one parcel. The point we make, however, is not made under the 466th section, but under the 445th and 450th sections.

The 445th section prohibits the sale of any property for less than two-thirds of the appraised cash value thereof; and the 450th section requires that separate lots or parcels should be *appraised separately.*

In this case there was a separate appraisement, but it is not shown that each parcel brought two-thirds of its appraised value, but only the whole sold for a sum equal to or greater than the two-thirds of the sum of the separate values of all the parcels. This we insist is not sufficient.

But on the merits of the only question sought to be reviewed, if that question is properly before the Court, the judgment must be affirmed.

The copy of the decree under which the sheriff sold was not signed by the clerk nor sealed with the seal of the Court, and was therefore void.

We insist—

First. That an execution not authenticated by the seal of the Court from which it is issued, is a nullity.

Bouvier, in the 3rd volume of his Institutes, at page 573, in treating of executions, says. "It (the execution) must be signed by the Clerk of the Court, and sealed with the seal."

And in note "A" to the same page, it is said: "An execution issued without a seal from a court having and using a seal, is void, and of course all proceedings under it are void also; but if it be sealed, although it is not signed by the clerk, it is valid." (See Hall *vs.* Jones, 9th Pickering, 446; Exparte, Smith, 15th Pickering, 446; Wilhite *vs.* Randall, 30th Maine R., 170; Byers *vs.* Ashley, 2d Gilman's Illinois R., 151, and especially 166; Elliott *vs.* Shaw, 19th Maine Reports, 204.

Second. We further insist that there is an additional reason why this process should be held to be void, because of the absence of the seal of the Court, which does not apply to ordinary executions. That reason is, that a certified copy of the decree of foreclosure is not *per se* an execution; but is made to have the effect of execution by statutory enactment; and the statute which gives it this extraordinary effect, in terms requires it to be sealed with the seal of the Court.

The 635th section, on page 295 of 2d Gavin & Hord, provides that a copy of the order of sale and judgment shall be issued and certified by the clerk, under the seal of the Court, to the sheriff, who shall thereupon proceed to sell the mortgaged premises, &c., as upon execution.

The very fact that an extraordinary effect is given by this statute to the certified copy of the decree, is a strong reason why the statutory requirement that the copy should be certified by the clerk under the seal of the Court, should be held as essential to the validity of the writ.

But to return for a moment to the point that a writ of error will not lie in this case. We beg leave to cite the following authorities to the following points:

First. A refusal of a court to grant a new trial cannot be made the basis of a writ of error. (Conkling's Treatise, 3d edition, page 672, and cases there cited.

Second. It was held in 2d Mason, page 22, that the issue of *nul tiel record*, being an issue in fact, and although triable by the court, yet that a writ of error does not lie from a judgment thereon. (Conkling's Treatise, 673.)

So in this case, the issue formed on the plea of not guilty was an issue of fact, and although triable (by the consent of parties) by the Court, because it was an issue of fact, no writ of error lies from a finding and judgment of the Court on such issues.

CONRAD BAKER,
Atty. for Defts. in Error.

Robert Clarke & Co., Printers, 65 West Fourth Street, Cincinnati.

No. 124.

Supreme Court of the United States,

DECEMBER TERM, 1867.

The Ætna Insurance Co. and Joseph Bennett,
PLAINTIFFS IN ERROR,

versus

Doe, ex. dem. Allen C. Hallock and William C. Stoddard.

In error to the Circuit Court of the United States for the District of Indiana.

Brief of R. M. Corwine for Plaintiffs in Error.

CASE.

This was an action of ejectment brought by defendants in error against plaintiffs in error to recover certain real estate, situate in the city of Evansville, in the State of Indiana. It consists of certain lots which the record fully describes. On the trial below,

the plaintiffs offered evidence tending to show that they were in possession of the property in controversy at the time of the sale hereinafter referred to, under a valid title. The defendants then offered in evidence the record of the Vanderberg Circuit Court (Indiana), showing the proceedings of a suit in that court by plaintiffs in error against defendants in error to foreclose a mortgage on *these very* premises, said mortgage being made by *defendants* to secure the payment of a note made by Allen C. Hallock in favor of the said insurance company for three thousand dollars. There was due service of process and a decree in favor of plaintiffs for the sum due with interest, a foreclosure of the mortgage, together with an order of sale of said premises, with an award of execution for any balance that might be found due, after the property was exhausted, against the goods, chattels, etc., of the defendants, Allen C. Hallock and William C. Stoddard. The clerk then issued an order of sale, commanding the sheriff of that county to execute a decree of the court, "which is in the words and figures following, to wit:" and then it is set out *in hace verba* as the court pronounced it, and *constitutes in itself the order of sale.* This order is not sealed with the seal of the court; but it was delivered by the clerk to the sheriff of that county, who duly indorsed on it its receipt, and appends his official name to the indorsement. He returns this order of sale, the schedule and appraisement of this property, which shows the price affixed to each lot by the appraisers. He likewise returns that he duly advertised and sold the property to Joseph B. Bennett, one of the plaintiffs in error, and that he made him a *deed* therefor. The property sold consisted of lots numbered 1, 2, 3, 4, 5, 6, 7, and 8, which was not all the property embraced in the order of sale, but these are the lots for which this suit in ejectment was instituted. The sheriff first offered the rents and profits for the term of seven years without success. These proceedings were had in 1860, and this suit was instituted in 1865, nearly five years

after the sale of the property to Bennett. These facts being submitted to the circuit court, the court held that because said order of sale was not issued under the seal of the court, they would find for the plaintiffs, and judgment was accordingly entered for them, and against the defendants. The bill of exceptions sets forth the evidence and *this* point of law as the sole ruling of the circuit court. The exception goes to this ruling, and the evidence pertinent to illustrate it is set forth. The exception is not, therefore, alone to the judgment of the court overruling the motion for a new trial. The point excepted to is distinctly set out, and to that this argument must be addressed. It is the controlling question, for, in the absence of that ruling, the judgment must have been for the defendant in ejectment. It is for that error this suit is prosecuted, and the judgment asked to be reversed. I make no note of the remark in the brief of defendants' counsel, that the bill of exceptions does not disclose a deed from the sheriff to Bennett. The sheriff returns that he made a deed to him. But, if that were not a fact, the defendants are no better off, because no deed is set forth showing how they acquired title. The language on page 4 is that he offered "evidence satisfactory, showing that at the time of the sheriff's sale, of the premises in controversy, under the decree of foreclosure, he was in possession thereof under a valid title in fee simple." Both had deeds, though they are set forth in the record. In the one case, it was satisfactory to the court, and in the other, it appears the sheriff made a deed. There was no point made as to this. The sole question was that raised on the order of sale, viz: Did the omission to use the seal of the court make the order void, or was it avoidable merely?

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I.

The general rule in judicial sales is, that the purchaser is not bound to look beyond the "judgment, levy, and sale." All other steps are merely directory to the officer.

Jackson v. *Bartlett*, 8 Johnson, 361, 367.
Jackson v. *Rosevelt*, 13 Johnson, 101, 102.

Such as the issuing of an execution after a year and a day without a revivor. *Ib.*

As between the parties to the process, or their privies, the return is usually conclusive, and not liable to be collaterally impeached.

1 Little R.-66, 129.
17 Mass. 601.
4 Mass. 479.
7 Pick. 551.
3 Monroe, 351.
10 Pick. 169.
2 N. Hamp. 79–81.
1 Peters C. C. R. 441.
1 Carter (Indiana), 427, and 2 Carter (Indiana), 252, both same cases.

This case states the rule with respect to "irregular process" as usually applied to all process not issued in strict conformity to

law, whether the defect appear upon the face of the process, or by reference to extrinsic facts, and whether such defects render the process absolutely void or voidable; and concludes that irregular process does not establish the doctrine of notice to a purchaser under sale so made. The preliminary steps to be observed and followed by the officers of the court *after* judgment, such as the form of the execution or order of sale, whether the same is signed, sealed, or dated, or whether it recites all the matter usually inserted in executions, are often more directory than otherwise, and the omission of one or all of them can not affect the purchaser. He is required to look to the *judgment* and the *levy*. And so of the irregularities of the sheriff in advertising the requisite number of times, the formalities of the appraisement, whether the appraisers were sworn, or are freeholders. These are directory preliminary steps, and the neglect to perform any one or all of them strictly, can not affect the title of a purchaser. This is the general doctrine.

In the cases above cited from 1st and 2nd Carter, the Supreme Court of Indiana hold: first, that executions issued after a year, without revivor, and second, without an affidavit, such as is required by the statute of that state, were not void, but voidable, and could be reached by motion; but in collateral proceedings, they would not avail the party aggrieved.

But we need go no further than the Supreme Court of Indiana for authority to enforce this general doctrine with respect to judicial sales in that state that are sought to be distributed in collateral proceedings. Besides the cases just cited, in the case of *Sowle* v. *Champion*, 16 Indiana, 165, it is held that an order of sale, issued on a decree of foreclosure, which does not set out a copy of the decree, is informal, under the statute, but *is not void*, and if not set aside on defendants' motion, all acts done under it are valid.

Now, by reference to the statutes of Indiana, 2 Gavit & Hord, 295, it appears that:

"A copy of the order of sale and judgment shall be issued and certified by the clerk, *under the seal of the court* to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as shall be necessary to satisfy the judgment, interest, and costs, as upon execution; and, if any part of the judgment, interest, and costs remain unsatisfied, the sheriff shall forthwith proceed to levy the residue of the other property of the defendant."

This is the section of the law under which the process issued.

Now, it is to be observed:

First. That the direction "that *a copy of the order of sale* and judgment *shall* be issued" is as stringent and mandatory as that other direction, that it "shall be issued and certified by the clerk *under the seal of the court*," etc. And yet the Supreme Court of Indiana holds that it is not void, and if not set aside on the motion of defendants, all acts done under it are valid. It is not easy to perceive why, if the one is merely directory, the other is not also merely directory.

Second. The court determine the only way in which a defendant in such proceedings can avail himself of such irregularities, viz: by moving at the proper time to set them aside.

Third. That he can not take advantage of such irregularities in a collateral proceeding to recover his property sold under such process.

This seems to be the uniform practice in that state under these statutes. See the cases cited from 1st and 2nd Carter above.

The cases cited by counsel for defendant in error fail to sustain the view he seeks to enforce. Some of them are predicated of the statutes of their states, and others shoot wide of the mark. The one cited from 30th Maine, simply holds that the writ complained of was not *amendable;* and the one from the 19th Maine was the case of a motion to *quash a writ* for want of a seal. So of the case cited in 9th Pick. 446. It was a motion to amend a writ which had no seal. The case in 15th Pick. 446, was decided under a special statute regulating military appointments. The motion came in time as it might have done in this case had the defendant moved to set aside the sale before the sheriff made the deed to the purchaser.

This law then being merely directory to the clerk, the absence of any of these acts fail to be of the essence of the thing required to be done. As long as it appears that the process did actually issue out of the clerk's office, and as such came to the sheriff, the law was complied with, and he might well execute it. Being satisfied it was a true copy of the decree and judgment, entered in the case, and that it was the *act* of the clerk, he could go on and obey its mandate. The supreme court of that state says the seal, etc., might be there or not. Being directory only, its omission ceased to be of any particular consequence after the sale. It was not *essential.*

Lord Mansfield, in 1st Burrows, 447, says:

"There is a known distinction between circumstances, which are of the essence of a thing required to be done by an act of Parliament and clauses merely directory."

The relation of the plaintiff to the proceedings as purchaser makes no difference in the application of the rule to voidable pro-

cess. This is the rule in Indiana. *Doe* v. *Harter*, 2 Carter (Indiana), 253.

II.

But defendants claim that the writ of error should be dismissed, because the record does not disclose that there was a question of law reserved.

To this I reply that this is a mistake.

The court states a *fact* as being proved in the case, and then say that this *fact* defeats the title acquired at sheriff's sale, viz: the want of a seal to the order of sale. This was the only fact upon which was predicated the decision. Whereupon, the court say the law applied to this fact invalidates the sheriff's title. The record then proceeds (page 12): "To which finding of the court the defendant *at the time* excepted." Thus we see that an exception was taken to the ruling or finding of the court at the time it was made, and so the judge certifies. There is also an exception to the ruling of the court overruling the motion for a new trial. But the bill of exceptions covers both exceptions, and the testimony is set out only so far as is necessary to advertise the court of the facts upon which the ruling was made. The bill of exceptions is not perfectly accurate, and the terms used to express the action of the court, are not felicitous. Still, the substance is there, and the court can determine from it what the rulings were. One thing is most manifest, that the court predicates its finding on but one fact, viz:

the want of a seal to the order of sale. There was no other fact proved to defeat the sheriff's title. If that was legal, then the judgment must be affirmed: but if it was erroneous, then it must be reversed. The question is fairly presented, and the evidence is set out sufficiently clear.

The application for a new trial was based on the erroneous ruling with respect to the non-sealing of the order of sale, and it was enough to set forth the evidence applicable to it. If the court erred in that ruling, a new trial should have been granted, and thus the supreme court can determine on the facts set forth in this bill of exceptions. This court has held (11 Howard, 154), although a bill of exceptions is imperfectly drawn, yet if this court can ascertain the substance of the facts, and the questions on which the judge instructed the jury, are apparent, it will proceed to decide the case.

III.

The defendant in error seeks to sustain this judgment, because he says the sheriff's sale was irregular, in this, that it is not shown that each parcel or lot brought two-thirds of the appraisement. If this is an error, it is not one which can be taken advantage of in this kind of proceeding. But it is not even erroneous. The Supreme Court of Indiana has settled this proposition.

The sale, in this case, was strictly according to the principle of this decision. Here there was a separate appraisement, and the property was offered for the rents and profits for seven years. And,

doubtless, the sale was in accordance with the appraisement. There is nothing in the return to show that it was not so, and the court will presume the officer did his duty. Besides, the law does not require him to make a specific return of the manner of conducting the sale. And, if it did, the irregularity should have been reached by the motion of the defendant.

I submit that the judgment of the circuit court should be reversed.

R. M. CORWINE,

For Plaintiffs in Error.